EAGAIVALLINAYAGI AMMAL v. CHIN MIN HUA & ORS

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
ABANG ISKANDAR JCA
HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: P-02(W)-1436-07-2017]
23 JANUARY 2020

LIMITATION: *Land – Recovery of – Sale and purchase of land – Limitation period – 12 years from date of accrual of cause of action – Balance purchase price paid into purchaser's solicitors' clients' account 17 years after due date – Monies released to vendor after 21 years – Whether time expressed to be essence of agreement – Whether action filed past limitation period – Limitation Act 1953, s. 9(1)*

LIMITATION: *Laches, doctrine of – Delay in taking action – Action to recover land pursuant to sale and purchase agreement – Action filed past limitation period of 12 years – Whether time expressed to be of essence of agreement – Balance purchase price paid into purchaser's solicitors' clients' account 17 years after due date and released to vendor after 21 years – Whether purchaser slept on his rights – Whether laches set in*

CONTRACT: *Specific performance – Sale and purchase agreement – Whether remedy of specific performance must be exercised judiciously – Whether purchaser ready and able to pay balance purchase price – Delay of 17 years to pay balance purchase price – Whether constituted gross delay by purchaser – Whether caused unfair advantage to vendor – Whether value of property increased manifold – Whether to compel sale of property at original price created severe hardship to vendor – Whether manifestly unjust to grant specific performance*

The respondents' (plaintiffs') father ('purchaser') entered into a sale and purchase agreement ('SPA') with the appellant ('defendant'), being the attorney to the landowner, to purchase a piece of land on 25 May 1996 for a sum of RM213,673.60. The purchaser paid a sum of RM20,000 on signing the SPA, pursuant to the condition precedent to the SPA on 22 September 2013, which was 17 years after the due date. The final balance was paid onto the purchasers' solicitors' clients' account 17 years after the due date and the monies were never released to the vendor for more than 21 years despite the purchasers having transferred the ownership of the land in 2013. The plaintiffs brought this claim for specific performance of the SPA *ie*, after almost 14 years from the date of the SPA. The defendant, on the other hand, filed a counterclaim for an order, among others, that the private caveat entered by the plaintiffs on the land be removed and for damages arising from the lodgement of the caveat. The High Court allowed the plaintiffs' claim and dismissed the defendant's counterclaim. Hence, the appeal by the defendant on the issues of: (i) whether the defendant needed to give notice in writing

upon the expiry of the SPA; and (ii) if the answer was in the negative and the notice in writing as to the expiry was given after the expiry period, would that constitute a waiver of the expiry period.

Held (allowing appeal)
Per Abang Iskandar JCA delivering the judgment of the court:

(1) A cause of action for the recovery of land pursuant to a contract has a limitation period of 12 years from the date when the cause of action accrues, pursuant to s. 9(1) of the Limitation Act 1953. Clause 14 of the SPA provides that time was of the essence of the agreement. The First Schedule, Part 10 of the SPA expressly stipulated that the completion date was 90 days from the date of the SPA, namely, 23 May 1996. Part 15 of the First Schedule stated that the extension period of the completion date was 60 days. Therefore, the accrual of the plaintiffs' right to sue the defendant was triggered on either of the dates, which happened in 1996 and not in 2001. Since the action was filed by the plaintiffs only in 2009, it was well past the limitation period of 12 years. (paras 17 & 20)

(2) The doctrine of laches acts to deny a claimant who sits on his rights. The rationale was that it recognised that an adversary could lose evidence, witnesses and a fair chance to defend himself after the inevitable passage of time from the date that the alleged wrong or breach was committed. The balance of the purchase price of the property was only paid into the purchasers' solicitors' clients' account 17 years after the due date and the monies were never released to the vendor for more than 21 years. It would be grossly unfair to order the defendant to perform his side of the bargain to give effect to the SPA when the purchaser had evinced no clear intention on his part to close the deal in his favour. Instead of acting with reasonable speed to effectuate the SPA by complying with the pre-conditions, the purchaser had slept on his right by doing practically nothing to help himself to fulfil his part of the bargain. Therefore, laches had set in to deny the plaintiffs of their claim in respect of the property. (paras 21, 22, 24-26 & 28)

(3) The remedy of specific performance, being an equitable relief, must be exercised judiciously. The deceased purchaser must show that he was not at fault, in the sense that his hands were not tainted with any blame which could be attributable to this own action, inaction or omission. The agreement was executed in 1996 and the purchaser died in 2002. In between, he did nothing substantial that could be interpreted as evincing an intention to complete the purchase. The plaintiffs had also failed to show cogent evidence that the purchaser was ready and able to pay the balance of the purchase price of the subject property during his life time. The mere tendering of letter from the bank which had approved the bank loan could not discharge the onus on the deceased purchaser's ability to pay for the balance purchase price. (paras 29-31)

(4) The right to institute an action for specific performance under cl. 7(b) of the SPA must be exercised within legal limits as well as within the accepted equitable principles with regards to timeliness. Not only had there been a gross delay by the purchaser to discharge his obligation, the plaintiffs were also not in a position to pay up the balance of the purchase price. It was an unfair advantage for the plaintiffs to procure a property after the time period in the SPA having lapsed and paying the balance purchase price 17 years later as the value of the property had increased manifold. To compel the property to be sold at the original price created severe hardship to the defendant. It would be manifestly unjust to grant specific performance in favour of the plaintiffs. (paras 32, 33 & 36)

(5) The first question was answered in the negative. There was nothing in the SPA that imposed any burden or obligation on the defendant to give any notice in writing upon the expiry of the SPA. A notice in writing after the expiry period would not amount to a waiver of the expiry period. (para 39)

Case(s) referred to:

Gan Realty Sdn Bhd & Ors v. Nicholas & Ors [1969] 1 LNS 44 HC ***(refd)***
Henderson v Foxworth Investments Ltd and Another [2014] 1 WLR 2600 ***(refd)***
Lamare v. Dixon (1873) LR 6 HL 414 ***(refd)***
Leisure Farm Corporation Sdn Bhd v. Kabushiki Kaisha Ngu & Ors [2017] 1 LNS 499 CA ***(refd)***
Loh Koon Moy & Anor v. Zaibun SA Syed Ahmad [1977] 1 LNS 65 FC ***(refd)***
Mohamed v. Ho Wai [1960] 1 LNS 75 HC ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
Padang Serai Kilang Kayu Bhd v. Khor Kia Fong & Ors [1997] 5 CLJ 428 HC ***(refd)***
Ponnusamy & Anor v. Nathu Ram [1958] 1 LNS 46 HC ***(refd)***
Re Schwabacher (1908) 98 LT 127 ***(refd)***
Ryan v. Mutual Tontine Association (1893) 1 Ch 116 ***(refd)***
Shirley Koh Gek Ngo & Anor v. Tanah Emas Bio-Tech (M) Sdn Bhd [2014] 1 LNS 687 CA ***(refd)***
Waring & Gillow v. Thompson (1912) 29 TLR 154 ***(refd)***
Zaibun Sa Syed Ahmad v. Loh Koon May & Anor [1982] CLJ 457; [1982] CLJ (Rep) 58 PC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 56(1)
Limitation Act 1953, ss. 6(6), 9(1)

Other source(s) referred to:

Chitty on Contracts, General Principles, 25th edn, chapter 27
Sinnadurai, *The Sale and Purchase of Real Property in Malaysia,* Singapore, Butterworth, 1984, p 414
Spry, ICF, *The Principles of Equitable Remedies, Specific Performance, Injunctions, Rectification and Equitable Damages,* 2nd edn 1980), Sweet & Maxwell, England, pp 4 & 5

For the appellant - Darshan Singh & Manjit Singh Gill; M/s Darshan, Syed, Amarjit & Partners

For the respondents - Sunita Shalini Sankey & Vincent Tey Wei Seng; M/s Jublin Tan & Tey

[Editor's note: For the High Court judgment, please see Chin Min Hua & Ors v. Eagaivallinayagi Ammal [2018] 6 CLJ 482 (overruled).]

Reported by S Barathi

JUDGMENT

Abang Iskandar JCA:

Brief Facts Of The Case/Case For Plaintiff

[1] Chin Min Hua, Chin Ah Bah @ Chin Min Heng, Chin Min Hook are the plaintiffs in this case ("the plaintiffs"). The plaintiffs' father ("the purchaser") entered into a sale and purchase agreement ("said agreement") with Eagaivallinayagi Ammal ("the defendant") (being the attorney to the landowner, one Selvarajah a/l Ratnam) to purchase a piece of land situated at Geran Mukim No 325, Lot 725, Mukim 5, Daerah Seberang Perai, Pulau Pinang (the "said land") on 25 May 1996 for a sum of RM213,673.60.

[2] The condition precedents pursuant to the said agreement to effect the sale are:

(i) The deposit sum of RM21,367.36 was to be paid upon execution of the said agreement;

(ii) RM20,000 to be deposited into the client's account of the purchasers' solicitors as a stakeholder (in order to compensate the squatters) on or before 23 August 1996; and

(iii) The final balance purchase price of RM172,306.24 to be paid to the purchasers' solicitors on or before 21 August 1996 with an extended period of 30 days ie, up to 21 September 1996 was given to the purchaser provided an interest sum of 9% per annum paid.

[3] The purchaser paid the sum of RM20,000 on signing the said agreement, pursuant to para. (ii) above on 22 September 2013 ie, 17 years after due date and on para. (iii) was paid onto the purchasers' solicitors client account 17 years after the due date and the monies were never released to the vendor for more than 21 years despite the purchasers having transferred the ownership of the land in the year 2013.

[4] The plaintiffs, being the children of the late purchaser have brought this claim to the Penang High Court after the demise of the purchaser for specific performance of the said agreement ie, after almost 14 years from the date of the said agreement.

[5] The defendant on the other hand, had filed a counter-claim for an order, among others, that the private caveat entered by the plaintiffs on the land be removed and for damages arising from the lodgement of the said caveat.

At The High Court

[6] At the High Court, the court found the issues to be determined as follows:

(i) Whether or not the memorandum of transfer ("MOT") was delivered to the purchaser's solicitor as per the terms of the said agreement;

(ii) Whether the plaintiffs are entitled to the relief of specific performance of the said agreement and such other consequential relief arising therefrom;

(iii) Whether the plaintiffs' claim is barred by limitation and/or doctrine of laches; and

(iv) Whether the defendant is entitled to terminate the said agreement, forfeit the 10% deposit and be entitled to retain ownership of the property under the said agreement.

[7] After a full trial, the plaintiffs' claim was allowed by the court and the defendant's counterclaim was dismissed. In finding so, the court held, among others:

(i) In respect of the MOT issue, the court found that the defendant failed to produce any evidence of the service letter showing any acknowledgment of service of the MOT. The defendant had in failing to deliver and/or prove that such service of the MOT was made to the plaintiffs' solicitor, breached the fundamental terms of the said agreement.

(ii) On the time is of the essence issue, the court found that based on the facts of the case, the time has been made the essence of the contract pursuant to cl. 14 of the said agreement. That being the case, s. 56(1) of the Contracts Act 1950 should be invoked which provides that failure to perform within a fixed time in a contract, where time is essential, would render the contract voidable. However, neither the purchaser nor the defendant rescinded the said agreement and had treated the contract as subsisting.

(iii) In absence of either parties' intention to rescind the said agreement upon breach by the defendant, the said agreement remained in existence and that the time as stipulated in the said agreement ceases to be of the essence of the said agreement and becomes at large.

(iv) On the issue of limitation, the court held that pursuant to the terms of the said agreement, the purchaser's and/or plaintiffs' duty to make payment for the balance purchase price shall only arise upon delivery of the duly executed MOT of which the defendant had failed to prove.

(v) The purchaser and/or plaintiffs had by conduct treated the said agreement as still subsisting. The defendant, however, failed to take any positive steps to issue a notice of demand for the balance purchase price from the purchaser, never requested for the RM20,000 to be paid to the squatters as stipulated under the said agreement and failed to issue any notice of termination after the expiry of the completion date.

(vi) Only on 27 June 2001 that the defendant instructed the solicitor to issue a notice of termination to the purchaser.

(vii) The court found that the period of limitation can be said to have begun only from the first clear and unequivocal threat to the purchaser's right to the transfer of the said land that is on 27 June 2001.

(viii) The plaintiffs' claim filed on 3 December 2009 was well within the 12 years' period provided under s. 9 of the Limitation Act 1953, and therefore not time-barred.

(ix) The court also found that even there is a considerable delay by the plaintiffs, the crucial factor to be determined is whether such delay has resulted in any acts which detrimentally affect particularly to the defendant. In this respect, no steps have been taken by the defendant to deal with the property. There was no evidence of a disposition to a third party.

(x) The court held that it does not appear to be a case where laches would apply so as to defeat the plaintiffs' claim. There was a delay on the part of the plaintiffs, however, nothing was done by the defendant which resulted in a disposition of the property.

(xi) On the specific performance itself, the court found that where a valid contract for the sale of immovable property and breach thereof proved, coupled with the fact that there is no allegation or evidence that the conduct of the plaintiffs' have been such as to disentitle them to the equitable relief sought, the conditions required for the presumption under s. 11(2) Specific Relief Act 1950 ("SRA") would be considered to be present.

(xii) The defendant failed to rebut the presumption under s. 11(2) of the SRA.

The Appeal

[8] Dissatisfied with the High Court's decision, the defendant lodged an appeal against the said decision to the Court of Appeal. We had heard submissions by both learned counsel and we had also considered their written submissions.

[9] To recap, the issues before us as articulated on behalf of the defendant were as follows:

(i) does the defendant (as the vendor) needs to give a notice in writing upon the expiry of the said agreement; and

(ii) if the answer is in the negative and, a notice in writing as to the expiry is given after that expiry period, would that constitute a waiver of the expiry period.

The Deliberation

[10] During the appeal before us, the defendant raised two broad issues, the determination of which would effectively dispose of this appeal. One related to the issue of laches and limitation, while the other related to the issue of notice which the defendant had given to the plaintiffs pertaining to the termination of the said agreement.

[11] We will deal with the second issue, namely on the notice first. From our perusal of the evidence adduced during the trial, the defendant sent the said notice to the plaintiffs on the 27 June 2001. This, in effect, was about five years after the signing of the said agreement involving the subject property. The significance of this event in the scheme of things in the overall scenario had been that, as was submitted by the plaintiffs, such notice by the defendant must be taken as the effective date of termination of the said agreement by the defendant, which was allegedly illegal, thereby occasioning a breach by the defendant of the said agreement. Premised on that submission, the plaintiffs further submitted that their cause of action against the defendant accrued on that date. As such, as this action was filed in 2009, it was well within the 12 years' time frame. The learned trial judge had agreed with them and learned counsel for the plaintiffs had urged this court to also find that their action against the defendant was not caught by limitation. And it was the plaintiffs' submission as well that neither were they guilty of laches.

[12] Learned counsel for the defendant submitted that the notice of 27 June 2001 was an innocuous one and that nothing adverse ought to be interpreted as coming out of it. He alluded to the fact that time was of the essence as provided for under the said agreement. As there was no compliance on payment by the deceased purchaser, there was, therefore, no need for a termination notice. To the defendant, the issue of the notice had been a house-keeping exercise, as the defendant had not heard from the purchaser for years. Apart from the payment of the 10% deposit, there were no correspondences from the purchaser regarding the property for years. Actually, there was nothing emanating from the purchaser up to the time when he had passed away. During his lifetime, as was relevant to the said agreement, the purchaser never indicated his intention to the defendant that he was going to pay off the balance of the purchase price, let alone indicating to the defendant about his capacity, financially, to pay off the balance of the

purchase price. In other words, there was no overt conduct on the part of the purchaser to evince a clear intention on his part to pay the balance of the purchase price of the subject property. In fact, when he died, the balance of the purchase price had remained unpaid to the defendant. It was after his demise that his estate through the plaintiffs proceeded to sue the defendant for specific performance of the said agreement from the defendant.

[13] Now, the defence of limitation and laches are rather unique. We say so because if either of these defences bites, the claim by the plaintiffs is defeated. The claim of the plaintiffs is defeated not on account of the merits or demerits of the claim, but rather, because as regards to limitation, statute has so provided that there should be a time limit as to how long a plaintiff can sit on his right to sue for reliefs against a party whom it sees as the cause of its misery. As regards to laches, it is premised on the doctrine, grounded on equity, that similarly, a plaintiff who sits on his right without initiating an action against the wrong party, may have his belatedly filed suit dismissed due to unreasonable delay in asserting his rightful claim. Laches is thus, an equitable form of estoppel working against a claimant, based on unexplained and unjustified delay on the part of the claimant. As had been alluded to earlier, in both instances, where limitation and/or laches apply, it matters not that the plaintiff's suit may be highly meritorious. In other words, a perfectly strong case on its merits may not see full ventilation in court, as it is defeated by the unreasonable delay in pursuing a remedy in court. (See, Sinnadurai, *The Sale and Purchase of Real Property in Malaysia*, Singapore, Butterworth, 1984, p. 414. See also *Chitty on Contracts, General Principles* (25th edn.) chapter 27. See also cases, namely *Re Schwabacher* (1908) 98 LT 127, 28; *Waring & Gillow v. Thompson* (1912) 29 TLR, 154; *Ryan v. Mutual Tontine Association* (1893) 1 Ch 116; Spry, ICF, *The Principles of Equitable Remedies, Specific Performance, Injunctions, Rectification and Equitable Damages* (2nd edn 1980), Sweet & Maxwell, England, pp. 4 and 5. Once, limitation by statute, or laches by equity sets in, just like the proverbial *rigor mortis*, it is irreversible. The belated action is dealt a mortal blow.

[14] As regards specific performance, according to s. 11 of the SRA, it can be granted in matters pertaining to breach of contract to transfer immovable property where an award of damages is not a sufficient remedy. (See, *Zaibun Sa Syed Ahmad v. Loh Koon Moy & Anor* [1982] CLJ 457; [1982] CLJ (Rep) 58; [1982] 2 MLJ 92 (PC). Similarly, this relief could not also be granted in the executory contracts: *Mohamed v. Ho Wai* [1960] 1 LNS 75; [1961] MLJ 7 and where actual losses could not be ascertained: *Gan Realty Sdn Bhd & Ors v. Nicholas & Ors* [1969] 1 LNS 44; [1969] 2 MLJ 110.

[15] For a cause of action to accrue, there must have been a breach of a contractual duty. Cause of action also means 'a right to sue'. There cannot be a 'right to sue' until and unless there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe the right of the defendant against whom the suit is instituted.

(See, the *ratio* of Alauddin Mohd Sheriff J (as he then was) in *Padang Serai Kilang Kayu Bhd v. Khor Kia Fong & Ors* [1997] 5 CLJ 428; [1998] 1 MLJ 589.

[16] Generally, a cause of action founded on a contract must be filed in court within six years from the date of the alleged breach thereof. Section 6(6) of the Limitation Act 1953 states as follows:

> … the provisions of this section shall apply (if necessary by analogy) to all claims for specific performance of a contract or for an injunction or for other equitable relief whether the same be founded upon any contract or tort or upon any trust or other ground in equity.

[17] However, a cause of action for the recovery of land pursuant to a contract has a limitation period of 12 years from the date when the cause of action accrues. The limitation period for an action to recover land is 12 years pursuant to s. 9(1) of the Limitation Act 1953. Section 9(1) of the Limitation Act 1953 provides that:

> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

[18] The high authority for this proposition is found in the decision of the Federal Court in *Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32 in relation to the limitation period of action for specific performance of a contract of sale of land, where Gill FCJ had put this:

> It follows, therefore, that whether the action is for specific performance of an agreement for the sale of land or for a declaration of title to land, it is essentially an action to recover land, so that the period of limitation would be 12 years in either case.

(See also per Thomson CJ in *Ponnusamy & Anor v. Nathu Ram* [1958] 1 LNS 46; [1959] 1 MLJ 86 where he said, *inter alia*:

> That reasoning leads me to the conclusion that this is an action to recover land within the meaning of s. 9 of the Limitation Ordinance (No 4 of 1953). Having reached the conclusion that this is an action to recover land ... it seems to me impossible to avoid the further conclusion that the case falls within section 9(1) of the Limitation Ordinance. Section 6(1) of the Ordinance provides that in the case action of founded on a contract the period of limitation shall be six years but that provision is expressly stated to be 'save as hereinafter provided'. By section 9, however, it is expressly provided that, subject to certain exceptions which are not relevant here, the period in relation to actions to recover any land shall be 12 years and it is clear that this applies to all actions to recover land irrespective of whether they are founded on contract or otherwise.

[19] In this case, the defendant submitted that the purchaser should have taken action against her in August or October 1996 when she had allegedly breached the said agreement by failing to deliver the MOT to the purchaser

within the time as stipulated in the said agreement. Those lapses would constitute the time when the cause of action had accrued in favour of the purchaser, to initiate action against the defendant. The ensuing paragraph would detail the factual matrix relevant to this submission by the defendant.

[20] As such, the crucial question had become: 'when did the plaintiffs' cause of action accrue against the defendant?' The law as stated above is clear. Going by the provisions under s. 9(1) of the Limitation Act 1953 the 12 years had lapsed on 3 December 2009 when the plaintiffs filed in this action against the defendant for specific performance. In this case, it is rather clear from the evidence adduced that the defendant had breached the said agreement at least twice, and those breaches happened quite early in the transaction. Those breaches were concerned with the surrender of the memorandum of transfer to the deceased purchaser. The first breach happened on the 21 August 1996 and the second breach occurred 60 days later, namely on the 21 October 1996 when the defendant again failed to do the same. This must be so, as time was of the essence of the agreement as provided for under cl. 14 of the said agreement, stipulated as follows: "TIME OF THE ESSENCE Time in respect of all acts and payments, wherever mentioned shall be of the essence of this agreement." The First Schedule, Part 10 of the said agreement expressly stipulated that the completion date is 90 days from the date of the said agreement, namely 23 May 1996. Part 15 of the same First Schedule stated that the extension period of the completion date is 60 days. The accrual of the plaintiffs' right to sue the defendant was triggered on either of the dates, which happened in 1996. It did not happen in 2001 as was submitted by the plaintiffs and which submission was erroneously accepted by the learned trial judge as the date of breach by the defendant. As such, since this action was filed by the plaintiffs only in 2009, it was well past the limitation period of 12 years, as provided for under s. 9(1) of the Limitation Act 1953.

[21] Again, the doctrine of laches is relevant here. The doctrine acts to deny a claimant who sits on his right. A delay in itself may not necessarily be fatal. It is the unexplained delay that the court shuns upon. It causes prejudice against the defendant, especially in the preparation of his plausible defence. Indeed, in this case, the solicitor for the defendant was not able to show documentary proof of a certain document because under the Bar Council Rules 18.01, a solicitor is required only to keep records of a transaction for a period of up to 12 years from the date of the said transaction. The delay had caused prejudice to the defendant's cause. He had been disadvantaged by the plaintiffs' undue delay in initiating their purported claim against him for specific performance. The rationale behind this principle is that it recognises that an adversary can lose evidence, witnesses, and a fair chance to defend himself after the inevitable passages of time from the date that the alleged wrong or breach was committed. Equity does not lend her hand to assist an indolent litigant. While equity assists the vigilant, definitely she does not assist those who slumber on their rights.

[22] We were in agreement with the defendant that the plaintiffs were such litigants. Hence the maxim, "Equity will not grant relief from a self-created hardship" applies against the plaintiffs. A

[23] A perusal of the said agreement also yielded some salient features peculiar to it. These came in the form of condition precedents which the deceased purchaser was obligated to fulfill as part of the said agreement to effect the said sale of the property, namely: B

(i) The deposit sum of RM21,367.36 was to be paid upon execution of the said agreement;

(ii) RM20,000 to be deposited into the client's account of the purchasers' solicitors as a stakeholder (in order to compensate the squatters) on or before 23 August 1996; and C

(iii) The final balance purchase price of RM172,306.24 to be paid to the purchasers' solicitors on or before 21 August 1996 with an extended period of 30 days ie, up to 21 September 1996 was given to the purchaser provided an interest sum of 9% per annum paid. D

[24] As the uncontroverted facts of this case had shown, the purchaser only paid the sum of RM20,000 pursuant to para. (ii) above on 22 September 2013, when in fact, as agreed and stipulated in said agreement, that sum should be paid on or before 23 August 1996. The lateness or delay on the part of the purchaser to comply with that condition is 17 years after the due date. E

[25] As regards to the payment of the balance of the purchase price of the property, it was only paid into the purchasers' solicitor's client account 17 years after the due date and the monies were never released to the vendor for more than 21 years. F

[26] Under such circumstances as enumerated above, it would be grossly unfair to order the defendant to perform his side of the bargain to give effect to the said agreement when the purchaser had evinced no clear intention on his part to close the deal in his favour. Instead of acting with reasonable speed to effectuate the said agreement by complying with the pre-conditions that we had alluded to above, the purchaser had literally slept on his right by doing practically nothing to help himself to fulfill his part of the bargain. In fact, the learned trial judge found as a fact that the plaintiffs could not offer any plausible or tenable explanation for the obvious and inordinate delay, but instead of holding the plaintiffs accountable for such delay, the learned trial judge had gone on to blame the defendant for doing nothing. (See, p. 39 para. 64 of the grounds of judgment (Rekod Rayuan Jilid 1 – Bahagian A). G H

[27] In such glaring circumstances, it would be, to our minds, highly inequitable for the court to render equitable relief to the purchaser, who even in his own lifetime, had seen it fit not to reasonably pursue and prosecute his right under the said agreement. In fact, he was always very late in fulfilling his obligations under the said agreement. I

[28] In these circumstances, we agreed with the defendant that laches had set in to deny the plaintiffs of their claims in respect of the property which their late father had intended to purchase from the defendant. In fact, limitation had also set in to bar the plaintiffs from claiming for specific performance against the defendant. The 12 years made available, under s. 9(1) of the Limitation Act 1953 within which period of time the plaintiffs could file in their relief to recover the land had come and gone. As it had come to pass, the plaintiffs only sought to file in their claims against the defendant after the expiry of this period. In fact, the plaintiffs had, on the merits, failed to justify why an order for specific performance ought to be issued against the defendant, when the plaintiffs themselves failed to show, by way of evidence, that the deceased was at the relevant and material time, ready to fulfill his part of the bargain. It was very clear to us that there had been an unexplained delay on his part to comply with the payment of the RM20,000 for removal of squatters from the property and the late payment of the balance of the purchase price to the deceased purchaser's solicitor. In both instances, the inexplicable delay involved was nearly 20 years from the date of the execution of the said agreement.

[29] The remedy of specific performance being an equitable relief, the court had wide discretion which has to be exercised judiciously in that, in the context of this case, the deceased purchaser must show that he was not at fault, in the sense that his hands were not tainted with any blame which could be attributable to his own action, inaction or omission. The said agreement was executed in 1996. The purchaser died in 2002 and in between, he did nothing substantial that could be interpreted as evincing an intention to complete the purchase. If indeed, the purchaser had the financial means to pay for the balance of the purchase price, why did he not pay for the same? His conduct pointed more to support the opposite contention.

[30] Even on the merits, the plaintiffs had failed to show cogent evidence that the purchaser was ready and able to pay the balance of the purchase price of the subject property during his lifetime. It is a trite principle regarding specific performance, that a claimant seeking this kind of relief must adduce evidence to the effect that he had paid the balance of the purchase price as agreed in the said agreement between them. The court will not grant the claimant his prayer for specific performance if by so doing, it causes hardship on the part of the vendor.

[31] In the context of this case, we were with the defendant when his learned counsel submitted that the mere tendering of letter from the bank which had approved the bank loan could not discharge that onus on the deceased purchaser's ability to pay for the balance of the purchase price.

[32] Granted that the purchaser was given the right to institute an action for specific performance under cl. 7(b) of the said agreement, that right must be exercised within legal limits as well as within accepted equitable

principles with regards to timeliness as it is a relief grounded upon rules of equity which demand that one who comes before her must come with clean hands.

[33] The Court of Appeal in the case of *Leisure Farm Corporation Sdn Bhd v. Kabushiki Kaisha Ngu & Ors* [2017] 1 LNS 499; [2017] 5 MLJ 63 found that specific performance will not be granted if damages could be awarded and the conduct of the plaintiff may disentitle him from seeking specific performance. This case before us is a clear illustration as to why an order of specific performance ought not to be issued against the defendant. The deceased purchaser had, apart from having paid the initial deposit of RM21,367.36, done practically nothing that would evince a clear intention on his part to follow through with the said agreement with the defendant. Not only had months passed by, but years had gone by and still there was no evidence emanating from the purchaser having made the necessary inquiries from the defendant regarding the status of the land and the said agreement. Here, the plaintiffs only deposited the balance of the purchase price into their solicitors account on 2 September 2013 after 17 years had passed, an obligation which the deceased purchaser was in fact supposed to discharge in 1996 itself, as per the said agreement. Not only has there been a gross delay, but it also exhibited rather manifestly that the plaintiffs, not unlike their deceased father (the purchaser) who were not in a position to pay up the balance of the purchase price. Even when the plaintiffs filed this suit in 2009, no payment of the balance of the purchase price was made, not even to their solicitor. In 1996, the price of the subject property was about RM200,000 (RM172,306.34 + RM21,367.36) but after about 20 years the value had increased to about RM1.5 million, the latter figure being the evaluation carried out by Henry Butcher, a realty valuer. One can hardly blame the defendant that, to allow specific performance would not only cause hardship to her but that it would smack of unjust enrichment.

[34] In a claim seeking an equitable relief, a claimant cannot afford to exhibit any evidence of lax attitude and disinterestedness over a longish period of time, only to suddenly wake up one fine morning and crying out for what he claims is his right.

[35] We were aware of the provisions of s. 21(1) of the SRA in considering whether to grant specific performance, in that the discretion must be exercised judiciously. It must be ascertained that the plaintiff did not receive any unfair advantage and that the defendant would not suffer undue hardship as a result of it being ordered to specifically perform the contract with the plaintiff.

[36] In this appeal before us' the plaintiffs tried to procure a property after the time period in the said agreement having lapsed and paying the balance purchase price 17 years later is an unfair advantage as the value of the

property has increased manifold and now to compel the property being sold at the original price has certainly created severe hardship to the defendant. In the circumstances, it would be manifestly unjust to grant specific performance in favour of the plaintiffs. (See for example, the case of *Shirley Koh Gek Ngo & Anor v. Tanah Emas Bio-Tech (M) Sdn Bhd* [2014] 1 LNS 687; [2014] 6 MLJ 77).

[37] As regards the reliance by the learned trial judge on the Federal Court case of *Loh Koon Moy & Anor v. Zaibun Sa binti Syed Ahmad* [1977] 1 LNS 65; [1978] 2 MLJ 29 ("*Loh Koon Moy* case"), we agreed with learned counsel that the factual matrix that obtained in this case could be distinguished in that in that *Loh Koon Moy* case (*supra*) as there was already an order of court empowering seller to sell the land, whereas in our present appeal, there was no such order in existence when the action was filed.

[38] It has been stated in *Lamare v. Dixon* (1873) LR 6 HL 414, 423 that as a matter of principle:

> The discretion to refuse specific performance is not an arbitrary … discretion but one to be governed as far as possible by fixed rules and principles.

Our Findings

[39] Coming back to the issues at hand, the answers to those questions, upon due perusal of the appeal records must be that the question (i) is to be answered in the negative. There was nothing in the said agreement had imposed any burden or obligation onto the defendant, as the vendor or landowner, to give any notice in writing upon the expiry of the said agreement. As to the question (ii), we agreed with the defendant that the fact that a notice in writing as to the expiry after the expiry period would not amount to a waiver of the expiry period. It goes without saying that these issues had a direct impact on the issue of limitation.

[40] Upon due consideration of the overall evidence in this appeal, we were of the considered view that the plaintiffs had not brought themselves within the circumstances that would entitle them to the granting of specific performance in their favour, as prayed for by them. An appellate tribunal, such as this court, will only disturb and set aside a decision of a trial judge if a reasonable court, similarly circumstanced, would not have reached a decision of the trial judge now under scrutiny. Put differently, the postulation is thus: "What matters is whether the decision under appeal is one that no reasonable judge could have reached." (See, *Henderson v. Foxworth Investments Ltd and Another* [2014] 1 WLR 2600).

[41] In the circumstances, we found merits in the appeal of the defendant. The learned trial judge was plainly wrong in his decision. The circumstances in this case could not justify a decision in favour of the plaintiffs. The plaintiffs had failed to adduce evidence that could support a granting of equitable relief in their favour. Also, their claims had been defeated by

limitation as well as by laches. On top of that, even on merits, their evidence had fallen short in that they had failed to evince a financial capacity to pay up the balance of the purchase price. The learned trial judge had fallen into error when he acceded to their claims. In our considered view, a reasonable judge, similarly circumstanced as the learned trial judge in this case, would not have so decided the way he did in granting the specific performance.

Conclusion

[42] In the upshot, we had unanimously allowed the appeal by the defendant. The High Court Order dated 9 June 2017 was set aside. The counterclaim was allowed wherein the caveat was to be removed and damages to be assessed by the judge. We also ordered that the transfer of the MOT to be executed within 30 days from the date of our decision, failing which, the Senior Assistant Registrar is to execute the MOT. Costs of RM40,000 for here and below, subject to allocator fees and the deposit to be refunded.